34TH CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 170.

HENRY AND FREDERICK W. MEYER.

[To accompany bill C. C. No. 22.]

JANUARY 30, 1857.

Mr. BISHOP, from the Committee of Claims, made the following

REPORT.

The Committee of Claims, to whom was referred the bill of the House (C. C. No. 22) entitled "A bill for the relief of Henry and Frederick W. Meyer, merchants of the city of New York," report:

That they have carefully considered the above described bill, and are of the opinion that it ought not to pass. The opinion of the committee is so well expressed in the dissenting opinion of Judge Blackford, of the Court of Claims, upon the bill, that they adopt said opinion, and make it a part of this report.

H. & F. W. MEYER *vs.* THE UNITED STATES.

Judge Blackford's dissenting opinion:

Suit for overpaid duties.

I dissent from the final judgment rendered in this case for the claimants.

The ground of my dissent is, that the duties sued for were paid without any objection whatever, either written or verbal. The payment was voluntary, and cannot be recovered back.—(See act of Congress of 1845, 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496.)

The dissenting opinions heretofore delivered by me in the cases of Sturges, Bennet & Co. *vs.* The United States, Spence & Reid *vs.* The United States, Beatty's Executor *vs.* The United States, and Wood *vs.* The United States, are hereto appended, and made part of this opinion.

STURGES, BENNET & CO. *vs.* THE UNITED STATES.

The dissenting opinion was delivered by Judge Blackford:

I am obliged to dissent from the judgment of the court in this case. The petition attached to this opinion shows the grounds of the claim.

The duties sued for were collected during the years 1847, 1848, 1849, 1850, and 1851.

The petition, in my opinion, is defective, because it does not allege that any of the duties were paid *under protest*. The act of Congress of 1845, chapter 22, prohibits any suit against a collector for overpaid duties, if the payment was made without protest. That point is expressly decided by the circuit court of the United States for the Maryland district, at the April term, 1849, in Brune *vs.* Marriott. In that case, the protest was not made until *after* some of the duties were paid, and the decision was, that for such of the duties there could be no recovery. The language of the court is as follows: "The remaining question is, what duties were paid under protest, within the meaning of the act of 1845? That act requires that the protest shall be made in writing, signed by the claimant, at or before the payment of the duties, and set forth, distinctly and specifically, the grounds of objection. The protest of April 9, 1847, cannot apply to the payments previously made, and the plaintiff is not entitled to recover them. But it is sufficient to cover all subsequent payments," &c.

If there has been a protest, the suit is allowed, as the statute expressly says, in order "to ascertain and try the legality and validity of such demand and payment of duties." I consider that statute to be as applicable to a suit in this court against the government for overpaid duties, as it is to a suit for that cause in any other court against the collector. The object of both suits is the same, namely, to ascertain and try the legality and validity of the demand and payment of duties alleged to have been overpaid. If such demand and payment of duties were legal and valid, the importer cannot, in a court professing to be governed by legal principles, recover those duties, either from the collector or from the government. That appears to me to be a clear proposition. Congress has thought proper, by the law of 1845, to prescribe a certain rule for the collector and importer relative to the collection of duties; and whilst the law is in force that rule must be complied with. The rule is, that if the importer wishes to object to the amount of duty charged, the objection must be made at or before the payment of the duty. If no objection be made within the time limited by law, the demand and payment of the duty must be considered legal and valid.

It will be observed that the statute of 1845, which prohibits any suit for overpaid duties, unless there has been a sufficient protest, applies to duties of every description without exception.—(5 Stat. at Large, 727.) The effect of this statute relative to the protest is clearly stated in an opinion delivered by Chief Justice Taney in 1749. His language is as follows: "The protest is not required to be made on or before the payment of what are called the estimated duties. For this payment is necessarily regulated by the invoice quantity, as well as the invoice price. The importer cannot, at that time, know whether there has been any loss by leakage; nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice.

"The payment is legally made when the duties are finally deter-

mined, and the amount assessed by the collector; and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible if the portion disputed is not legally due, and that the claimant means to assert his right in a court of justice.

"The payment of the money upon the estimated duties is rather in the nature of a pledge or deposite than a payment. For it remains in the hands of the proper officer, subject to the final assessment of the duties; and if more has been paid than is due, (which is most commonly the case,) the overplus belongs to the importer, and is returned to him." (Brune *vs.* Marriott, before cited.) The Supreme Court affirmed that judgment, using, as to the protest, the following language: "But where the duties had not been closed up in any cases, when the written protest in April was filed—though the preliminary payment of the estimated duties had taken place—the court justly considered the protest valid. Because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer." (Marriott *vs.* Brune, 9 How., 619, 636.)

The law is therefore settled, that under the aforesaid statute of 1845 the importer is not required to make his protest until after the weigher or gauger has made his return, and the importer has had a full opportunity to know what that return is, and for what sum he is legally chargeable. That being the law, it is clear that there can be no hardship or injustice in requiring the protest. But, on the other hand, if at any distance of time after duties have been paid without objection, and with a full opportunity of knowing the facts, the United States are to be subject to be called upon for alleged overpaid duties, there will be no end to the evils that will ensue.

The language of the Supreme Court of the United States in 1851, with respect to the question now under consideration, is as follows: "But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made, the duties are not illegally exacted, in the legal sense of the term; for the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation. And if the party acquiesces, and does not, by his protest, appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

"Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case, in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the

principle decided in the case before us."—(Lawrence *vs.* Caswell, 13 Howard, 488, 496.) That is the unanimous opinion of the highest judicial tribunal in the United States on the precise question now before us. It is the opinion of that court on the meaning of the act of Congress of 1845, before referred to. That opinion is, that duties paid *without protest*, as the duties in the case before us were paid, are not illegally exacted. And, surely, if the duties now sued for were not illegally exacted, that is, if the collection of those duties was lawful, the claimants can have no right, in a court of justice, to recover them back, either from the collector or from the government.

My opinion is, therefore, that the petition shows no ground for relief.

SPENCE & REID, CONSIGNEE AGENTS OF MASON & TULLIS, *vs.* THE UNITED STATES.

[The petition of the claimants is hereto attached.]

Dissenting opinion, delivered by Judge Blackford:

I dissent from that part of the judgment in this case which sustains the present suit as to certain overcharged duties.

The duties in question were paid to the collector without a written protest setting forth the grounds of objection, and were afterwards paid by the collector into the treasury of the United States.

The decision of the court is, that duties paid without such protest may be recovered back by a suit in this court. That decision is, in my opinion, contrary to the act of Congress of 1845, chapter 22.

The dissenting opinions delivered by me in the cases of Sturges, Bennet & Co. *vs.* The United States, and of Beatty *vs.* The United States, are hereto attached and made part of this opinion.

Mason & Tullis, for whose use this suit is brought, sued the collector in Baltimore for overcharged duties on the same pimento mentioned in the present petition. The circuit court of the United States decided, in that case, that the suit was in substance a suit against the United States; and that "*the money was in the treasury, and must be paid from the treasury if the plaintiff recover.*" They also decided that the suit would not lie, because there was no legal protest.—(Mason & Tullis *vs.* Kane, circuit court of the United States for the Maryland district, April term, 1851.) That decision is in direct opposition to the present decision of this court in substantially the same case. The consequence of the judgment in this case is as follows: A merchant sues the collector in a circuit court of the United States for overcharged duties. The effect of the suit, if successful, is to obtain from the treasury of the United States the amount of those duties. But the suit fails for *the want of a legal protest*. The same merchant then turns round and sues the United States, in the Court of Claims, for the same duties, and recovers *without such protest*. One court decides that the treasury of the United States is liable upon the same state of facts on which the other decides that the treasury is not liable. It is impossible that these contradictory decisions can both be right.

The act of 1845 prescribes the condition, upon the performance of which, and only upon such performance, a suit will lie for overpaid duties. That condition is the making of a legal protest within the proper time. The policy of the act is very clear. It is noticed by Chief Justice Taney, in the following words: "Now, the act of February 26, 1845, in express terms, provides, that no action of this kind shall be maintained against a collector, 'unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.'

"It is not, therefore, sufficient to object to the payment of any particular duty or amount of duty, and to protest in writing against it. The claimant must do more. He must set forth in his protest the grounds upon which he objects, distinctly and specifically. And these latter words are too emphatic to be regarded as mere surplusage, or to be overlooked in the construction of this law. The object of this provision is obvious. In the multitude of collection offices in the United States, and the changes which so frequently take place in the officers, mistakes and oversights will sometimes take place and irregularities in the assessment of duties. And the object of this provision is to prevent a party from taking advantage of such objection when it is too late to correct them, and to compel him to disclose the grounds of his objection at the time when he makes his protest. The case before the court strikingly exemplifies the policy of this provision. One of the objections is, that the merchant appraisers did not actually inspect the pimento. It was not actually looked at and inspected by the appraisers, because there was no controversy about its quality. The consignees had notice and appeared before the merchant appraisers, and did not suggest that there was any defect in the quality which would lower the value, nor express a wish to have it inspected. They offered to prove that it was bought for the price at which it was invoiced, and that such was then the market price at the place where it was purchased. The appraisers were satisfied that it was bought at the price stated, but were of opinion that the price was lower than its market value in the principal markets of the island, and appraised its dutiable value accordingly.

"There is not the slightest reason to suppose that their assessment would have been, in any degree, influenced or changed by the actual inspection of the article. And if this objection had been stated in the protest, the error could have been immediately corrected before the duties were exacted; but it is now too late. And if this oversight be fatal to this appraisement, and renders it invalid, then the public lose, not only the enhanced duties to which the pimento was liable, but also the additional or penal duty which was the consequence of the merchant appraisal. The same may be said of the other grounds of objection above mentioned. If they had been set forth in the protest as the grounds of objection, and had been deemed tenable by the administrative department, the errors could have been corrected without the expense of litigation, and the duties which the law imposes secured to the public. And it is for this purpose that the act of 1845 requires the grounds of objection to be distinctly and specifically set

forth in the protest. For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States."—(Mason & Tullis *vs.* Kane, above cited.)

That opinion shows very clearly that the said act of 1845 is founded in sound policy. But whether it be so or not, no court can repeal it. Whilst it is in force it must be obeyed.

The only argument in the present case made by the claimants that appears to me to require an answer is, that this suit is not against the collector, but is against the United States. That argument admits of a short and conclusive answer. It is this: The law is settled by said decision of the United States court, that a suit against the collector for overcharged duties is, in truth, a suit against the United States. So that, according to that decision, which is certainly correct, the mere fact that this suit is against the United States, and not against the collector, is no reason that the suit should be sustained.

I must be permitted to repeat here, what was said by me in Sturges, Bennet & Co. *vs.* The United States, namely, that the Supreme Court of the United States has decided that duties paid without a legal protest are not illegally exacted.—(Lawrence *vs.* Caswell, 13 Howard, 488, 496.)

When the claimants contend that the duties in question ought not to be retained in the treasury, they forget that those duties are so retained, not for the money involved, but in obedience to the statute of 1845, which Congress, for wise purposes, has thought proper to enact. They forget that, as regards the collection of duties on imports, Congress has the right to prescribe by law what rules it thinks proper; and that all persons who choose to import goods subject to duty must conform to the rules which the law prescribes.

My opinion, therefore, is, that the petition shows no ground for relief.

BEATTY'S EXECUTOR *vs.* THE UNITED STATES.

Dissenting opinion, delivered by Judge Blackford:

I dissent from the judgment of the court in this case.

The petition, which is attached to this opinion, does not allege that the duties sued for were paid under protest.

The only question, therefore, which need be considered is, whether overpaid duties, paid without protest, can be recovered back by a suit in this court?

That question ought, in my opinion, to be decided in the negative.

The opinion on this subject, delivered by me a few days ago, in Sturges and others *vs.* The United States, is annexed to this opinion, and is to be considered a part of it.

The act of Congress of 1845, referred to in that opinion, after saying that nothing contained in the second section of the act of the 3d of March, 1839, "shall take away, or be construed to take away, or impair the right of any person or persons who have paid or shall hereafter pay money, as and for duties under protest, to any collector,"

&c., concludes as follows: "Nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."—(5 Stat. at Large, 727.) In the opinion in Sturges and others *vs.* The United States, I stated that I considered that act of 1845 to be as applicable to a suit in this court against the government for overpaid duties, as it is to a suit for that cause in any other court, against the collector. When that opinion was delivered I was not aware that the principle just alluded to had been recognized by any of the courts; yet, as it appeared to me so perfectly clear, I did not hesitate to adopt it. But I have since found that the same doctrine, namely, that a suit against a collector for overpaid duties is, in substance, a suit against the United States, had been expressly decided by the circuit court of the United States for the Maryland district. The following is the language of the court:

"For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States. The money is in the treasury, and must be paid from the treasury if the plaintiff recover. And as the United States cannot be sued and made a defendant in a court of justice without their consent, they have an undoubted right to annex to the privilege of suing them any conditions which they deem proper. And, in the exercise of this power, they have granted this privilege in the form of a suit against the collector, where duties are supposed to be overcharged, upon condition that the claimant, when he pays the money, shall give a written notice that he regards the demand as illegal, and means to contest the right of the United States in a court of justice; and stating also, at the same time, distinctly, the specific grounds upon which he objects. This is the condition upon which he is permitted to sue the collector, and thus to appeal from the administrative to the judicial department of the government. It is a condition precedent."—(Mason and Tullis *vs.* Kane, MSS.)

That opinion was delivered by Chief Justice Taney, and decides that a suit against the collector for overpaid duties is, in truth and substantially, a suit against the United States. And it also decides that such a suit cannot be sustained if the duties were paid without protest.

If that decision is correct, as it undoubtedly is, it shows conclusively that the suit now before this court, which is a suit against the United States for overpaid duties, paid without protest, is forbidden by the act of 1845, and, of course, cannot be sustained.

The claimant's main argument is, that his testator's money has been unlawfully obtained by the government, and that he has therefore a right to recover it back. The fallacy of that argument consists in assuming what is not true, namely, the unlawfulness of the collection of the money. The truth is, that the money having been paid without protest, was lawfully received by the collector and by the government.

Congress, as a matter of policy, enacted the aforesaid act of 1845;

and the Supreme Court of the United States have decided, as they were bound to decide, that, according to that act, duties paid without protest are not illegally exacted.—(Lawrence *vs.* Caswell, 13 Howard, 496.) The Court of Claims, like every other court, is bound by the law; and as the act of 1845 has forbidden any suit to be brought against the collector (which, it is decided, would be, in truth, a suit against the United States) for duties paid without protest, this court cannot, whilst that act is in force, sustain a suit against the government for duties so paid.

The act of 1845 fixes a reasonable time within which objections to the duties charged may be made, and says that if the objections are not made within the time, the duties shall not be recovered back. The object of that act is to secure prompt and final settlements relative to the duties, whilst the facts can be easily ascertained, and to prevent the continual disputes and frauds which would be occasioned by delay. The act appears to be founded on sound policy; but whether it is so or not is a question for the consideration, not of the courts, but of the legislature.

I am of opinion, for the above reasons, that this suit for over-paid duties, paid without protest, cannot be sustained.

DAVID WOOD *vs.* THE UNITED STATES.

Dissenting opinion, delivered by Blackford, J.

This is a suit for overcharged duties. The particulars of the claim will sufficiently appear from the following extract from the petition:

"Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were imposed and paid by him to the United States, not only on the value of the quantity of liquor, ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation, which was lost—which did not exist at the time when the duty was imposed—which was not and could not be imported into the United States. Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors."

There is no allegation in the petition that any objection whatever was made to the payment of the said duties.

No evidence has been taken in the case; and the only question now before the court is, whether the petition shows a good cause of action. The decision of a majority of the court is, that the petition is sufficient. From that decision I dissent. The ground of my dissent is, that the duties in question were paid without objection. The dissenting opinions heretofore delivered by me in the cases of Sturges, Bennet & Co. *vs.* The United States, Beatty's Executor *vs.* The United States, and Spence & Reid *vs.* The United States, are referred to as a part of this opinion. In the examination of those cases, I

became entirely satisfied that the act of Congress of 1845, cited and relied on by me, was a bar to the claims; and as I consider that act to be a bar in those cases, I, of course, consider it to be a bar in this case.

Since the judgment of the majority of the court in the present case was rendered, I have met with a decision of the district court of the United States for the eastern district of Pennsylvania, which clearly shows that, even *before the act of* 1845, overcharged duties paid without objection could not be recovered back from the United States. Such payments made without objection are what the law denominates voluntary payments; and the law is well settled that money so paid cannot be recovered back. This principle not only applies to the present case, but is also applicable to the aforesaid cases of Sturges, Bennet & Co. *vs.* The United States, Beatty's Executor *vs.* The United States, and Spence & Reid *vs.* The United States. The decision of the district court of the United States, above alluded to, is as follows:

An action was brought by the United States against Clement & Newman on a custom-house bond, dated 30th of June, 1841, conditioned for the payment of $793, that sum being part of the duties charged on an invoice of molasses imported, by the defendants, from Cuba into Philadelphia. The defendants claimed, among other things, a set-off of $345 22, being an alleged overcharge of duties previously paid by them. Mr. Watts, the district attorney, said in his argument that though the amount claimed there was small, the principle involved the restoration of an immense sum—not only fifteen or twenty thousand dollars, before paid by those defendants, but millions to other importers throughout the United States, paid by them voluntarily and without protest. * * * * * To the second credit the defendants ask for, we reply, first, that is covered by the same objections as the other; and, second, that the duties on which it is founded were paid voluntarily, and could not be recovered by the defendants, they having given no proof of compulsion or protest. Mr. Cadwalader, for the defendants, said: Both our claims, for credit or set-off, rest on these reasons, but the second is met by the additional objection that it was a voluntary payment without protest, and is therefore not recoverable against the United States. We reply that there is evidence of a protest to go to the jury, and that it was not a voluntary payment. It was required as a preliminary to entry, and was exacted *colore officii*, and is therefore not voluntary, and may be admitted as a set-off. The judge (27th of March, 1843) charged the jury as follows:

"If the jury believe that the value of the sugar or molasses embraces all costs and charges at the place of exportation, including the costs of hogsheads, barrels, boxes, &c., necessary to enable the parties to export it, then it will be unnecessary further to consider the question; should they think otherwise, then a new question arises for their consideration, and that is, where the duties on this shipment paid voluntarily and without objection, in consequence of the parties mistaking the law; if they were so paid, they cannot be recovered back, or deducted from the claim of the United States. It has been argued

that a payment to a public officer cannot be considered as a voluntary payment, as he holds the compulsory power in his own hands. This may be so, where the party paying objects, at the time of payment, to the propriety and legality of the charge. It is not necessary there should be a formal written protest, but there must be some objection, some notice that the claim is disputed, as the ground of objection or dispute may be removed or agreed to; but if paid without such objection, merely on a mistaken construction of the law, it is binding, and cannot be recovered back or set off against another demand. Was there any such notice or objection by the defendants at the time of payment? The only evidence on their part is that of Mr. Newman, who says there was no formal protest, but Mr. Clement informed him there was a mistake in calculating the duties, and that he (Mr. Clement) had been talking to Mr. Kern about it. Mr. Kern, who was a deputy collector, is since deceased; his testimony was not taken in his lifetime, and no witness is produced who heard the conversation. On the other side, Mr. Howell, deputy collector; Mr. Martin, the cashier; Mr. Bell, the ascertaining clerk; and Mr. McAdam, the bond clerk, have all been examined, and each of them say they never heard of any complaint by the defendant; and Mr. Howell states, that if such a complaint had been made, it would have been within his peculiar duty to examine it; but he knows of none. Still, this is a question of fact for the jury, and it is their province to decide it, the burden of proof being on the defendants. If you are satisfied that a duty was charged on the boxes, or hogsheads, over and above the value of the sugar, or molasses, at the time and place of exportation, and that such excess was paid by the defendants, they at the same time protesting or complaining against the justness or legality of the demand, then they are entitled to deduct the amount of such excess from the sum claimed in this suit. If, however, you believe that no excess was charged, or, if charged, that it was paid voluntarily, and without complaint, it is binding on the defendants, and they will not be entitled to the deduction." Verdict for the plaintiffs. (United States *vs.* Clement and Newman, Crabbe's Reports, 499 to 515.)

In the case just referred to, as before stated, the United States were the plaintiffs and Clement and Newman the defendants. The defendants claimed, as a set-off, a certain sum as having been paid for overcharged duties. The court decided in 1843, that if the duties had been paid without objection, the payment was voluntary, and could not be recovered back from the United States. That was the law, as said case decides, after the act of Congress of 1839, and before the act of 1845, relative to overcharged duties. When that decision was made, a verbal objection made at the time of payment was sufficient to enable the party to recover back from the United States, by way of set-off, overcharged duties. But by the act of 1845, no such recovery can be had, unless the objection was made in writing, and the grounds of the objection stated.

The above mentioned case of the United States *vs.* Clement and Newman was decided by a court of the United States, in which case the government of the United States was itself a party. The decision is entitled to great respect, and I cite it for the purpose of showing

that, independently of the act of 1845, there is no foundation for the present claim as described in the petition. That decision is in direct opposition to the judgment of the majority of the court in the present case.

The above are my reasons, in addition to those given in the cases of Sturges, Bennet & Co. *vs.* The United States, Beatty's Executor *vs.* The United States, and Spence & Reid *vs.* The United States, for my dissent, in the present case, from the judgment of the court.